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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTENE V. GREEN,

Petitioner,

v.

UKEME UMANA, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does ILCS 5/2-622 impermissibly restrict Ms. Green's right of free access to the courts, guaranteed by Amends. I, V and XIV of the United States Constitution, by requiring a certificate of merit from a health care professional before her medical malpractice suit can proceed beyond filing?

2. Does ILCS 5/2-622 impermissibly impinge on Ms. Green's right to petition the nation's courts, guaranteed by Amends. I of the United States Constitution, by conditioning access to the courts on a determination as to merit by individuals outside of the judicial system?

3. Does ILCS 5/2-622 violate Ms. Green's due process rights, guaranteed by Amend. XIV, U.S. CONST., by denying her a meaningful opportunity to be heard because it prevents a case from proceeding beyond filing without a certificate and report of merit by an eligible health care professional.

4. Does ILCS 5/2-622 violate Ms. Green's right to equal protection as provided for in Amend. XIV, U.S.CONST. by imposing on medical malpractice plaintiffs only the requirement to present a certificate and report of merit at the time the complaint is filed?

PARTIES

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Supreme Court of Illinois denied the Petition For Leave To Appeal.

Opinion of the Illinois Appellate Court published in Official Advance Reports Advance Sheet No. 15 (July 20, 1994).

JURISDICTION

1. The instant Petition For Certiorari is filed seeking review of an order denying discretionary review and entered by the Supreme Court of Illinois on October 2, 1996.

2. No rehearing was held nor extension of time to file the Petition For A Writ Of Certiorari granted.

3. Jurisdiction to review rulings of state courts as to federal questions on writ of certiorari is granted by 42 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

I. Amend I, U.S. CONST. as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. Amend. V, U.S. CONST. as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or liberty; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. Amend XIV, U.S. CONST. as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

28 U.S.C. §1257(a) as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

735 ILCS 5/2-622 as follows:

> Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
>
> 1. That the affiant has consulted and reviewed the facts of the case with a health

professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action. If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, or a psychologist, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit, but information which would identify the reviewing health

professional may be deleted from the copy so attached.

2. That the affiant was unable to obtain a consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days after the filing of the complaint. The defendant shall be excused from answering or otherwise pleading until 30 days after being served with a certificate required by paragraph 1.

3. That a request has been made by the plaintiff or his attorney for examination and copying of records pursuant to Part 20 of Article VIII of this Code and the party required to comply under those Sections has failed to produce such records within 60 days of the receipt of the request. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days following receipt of the requested records. All defendants except those whose failure to comply with Part 20 of Article VII of this Code is the basis for an affidavit under this paragraph shall be excused from answering or otherwise pleading until 30 days after being served with the certificate required of paragraph 1.

(b) Where a certificate and written report are required pursuant to this Section a separate

certificate and written report shall be filed as to each defendant who has been named in the complaint and shall be filed as to each defendant named at a later time.

(c) Where the plaintiff intends to rely on the doctrine of "res ipsa loquitur" as defined by Section 2-1113 of this Code, the certificate and written report must state that, in the opinion of the reviewing health professional, negligence has occurred in the course of medical treatment. The affiant shall certify upon filing of the complaint that he is relying on the doctrine of "res ipsa loquitur".

(d) When the attorney intends to rely on the doctrine of failure to inform of the consequences of the procedure, the attorney shall certify upon the filing of the complaint that the reviewing health professional has, after reviewing the medical record and other relevant materials involved in the particular action, concluded that a reasonable health professional would have informed the patient of the consequences of the procedure.

(e) Allegations and denials in the affidavit, made without reasonable cause and found to be untrue, shall subject the party pleading them or his attorney, or both, to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. In no event shall the award for

attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this Section.

(f) A reviewing health professional who in good faith prepared a report used in conjunction with an affidavit required by this Section shall have civil immunity from liability which otherwise might result from the preparation of such a report.

(g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.

(h) This Section does not apply to or affect any actions pending at the time of its effective date, but applies to cases filed on or after its effective date.

735 ILCS 5/2-619 as follows:

§5/2-619. Involuntary dismissal based upon certain defects or defenses. (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provision of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

(b) A similar motion may be made by any other party against whom a claim is asserted.

(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

(d) The raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer.

(e) Pleading over after denial by the court of a motion under this Section is not a waiver of any error in the decision denying the motion.

(f) The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.

STATEMENT OF THE CASE

The instant application arises from a complaint for medical malpractice. The Petitioner, Christene Green, began treatment with the Respondent, Uneme Umana, in 1988 after being referred from an eye examination offered by a national project. After her initial visit, she was diagnosed with glaucoma and treated with several medications pursuant to that diagnosis. App. 9.

Serious treatment issues arose after Ms. Green was treated with a laser procedure designed to lower the pressure in her eye. She was given a medication by one of the doctor's assistants which she used after the procedure. App. 11. Immediately after using the medication, Ms. Green experienced pain and blurred vision in the eye. She stopped using the medication prior to her return to the doctor, due to the problems it was causing, but damage had already been done. When she returned to the doctor, he told her that the medication (Pilocar) could damage her eye. App. 12. The doctor later acknowledged to Ms. Green's daughter that she had indeed been given the wrong medication. App. 17. Petitioner developed a "droopy" eyelid after the 1992 procedure. App. 12.

Ms. Green continued treatment under the doctor and he subsequently did conventional surgery during which he ran into complications. App. 12. The final outcome of all of the procedures was that Ms. Green was left with a "droopy" eyelid and almost no vision in the eye. In addition, the pressure in the

eye, which affected the progression of her glaucoma, was higher than before the surgery. App. 12-13.

The complaint filed by Ms. Green sought damages from the Respondent doctor for injuries sustained during various treatment procedures including laser and conventional surgery, and for the improper administration of medication. App. 15.

In her complaint, Plaintiff also challenged the constitutionality of 735 ILCS 5/2-622. Paragraph 32 of the complaint reads as follows:

32. That ILCS 735 5/2-622 is violative of the U.S. Constitution including Amends. I, V, VII and XIV on its face and as applied.

In her prayer for relief, Petitioner requested that the statute be declared unconstitutional.

C. That ILCS 735 5/2-622 be declared violative of the Constitutions of the United States and of Illinois on its face;

D. That ILCS 735 5/2-622 be declared violative of the Constitutions of the United States and of Illinois as applied.

Again in her reply to Defendant's Motion To Dismiss, Petitioner raised the constitutionality of the statute under which dismissal was sought as follows:

3. That ILCS 735 5/2-622 is violative of Amends. I, V, and XIV, U.S. CONST. in that it violates due process by imposing an impermissible restriction on the Plaintiff's access to the courts.

4. That ILCS 735 5/2-622 violates Amends. I, V and XIV, U.S. CONST. because it denies equal protection to complainants in cases involving medical claims.

5. That ILCS 735 5/2-622 violates Amends. I, V, and XIV, U.S. CONST. by abridging Plaintiff's privileges and immunities as a citizen of these United States.

See App. 15.

The trial court determined the statutes to be constitutional pursuant to ruling by the Illinois Supreme Court in DeLuna v. St. Elizabeth's Hospital, 147 Ill.2d 57 (1992). App. 5-8.

The Appellate Court of Illinois, 5th District, ruled (App. 2-4) that the statute was constitutional, again, pursuant to DeLuna v. St. Elizabeth's Hospital. Its opinion, in pertinent part, reads:

Plaintiff appeals to this court and contends that section 2-622 of the Code violates the Illinois and United States Constitutions by restricting access to the courts. Arguments similar to those raised in plaintiff's brief were considered by our supreme court in *DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 588 N.E.2d 1139 (1992). Our supreme court found that

section 2-622 was not unconstitutional. Where the supreme court has declared the law on any point, it alone can overrule or modify its previous opinion, the lower judicial tribunals being bound to follow such decision in similar cases. *Super Liquors, Inc. v. Illinois Liquor Control Comm'n*, 113 Ill.App.3rd 229, 232, 446 N.E.2d 945, 948 (1983). App.

The Illinois Supreme Court denied the Plaintiff's application for leave to appeal on October 2, 1996. App. 1.

REASONS FOR GRANTING THE WRIT

In response to claims that medical malpractice suits have driven insurance costs up, states have enacted statues which impose additional burdens on and/or barriers to potential plaintiffs [see Carson v. Maurer, 120 N.H. 925 (1980)]. The trend toward erecting prerequisites to and/or limitations on maintaining medical malpractice cases is evident in the laws of many states including Illinois. Statutes in several states have been challenged with differing outcomes. In Illinois, Massachusetts, Michigan, and Nebraska, statutes have been upheld. In Texas, Florida, Pennsylvania, and Missouri, they have been struck down. The types of restrictions imposed have ranged from requirements for certificates of merit (Illinois), to requirements that medical claims first be submitted to a screening board (e.g. Massachusetts).

The standard of review required for these statutes has been the subject of great debate. Whether they should be analyzed under a "rational basis" test or a "compelling state interest" test has been discussed by many state courts with no consistency of result. The test applied is frequently the determining factor in the decision as to whether a statute violates the U.S. Constitution. Indeed, as the provisions of many state constitutions are modeled on the U.S. Constitution, the states often look to the U.S. Supreme Court for guidance in interpreting the provisions of state constitutions. A ruling from this Court on the federal constitutional issues would not only be determinative as to federal issues, but persuasive as to challenges based on state issues.

Petitioner believes that the Illinois court utilized the incorrect standard in analyzing the constitutionality of the laws at issue. This Court has consistently required that laws impinging on fundamental rights serve a compelling state interest. The statute at issue here required only a "rational basis" to justify its enactment. Even under a "rational basis" test, however, this statute must fail.

The limitation on access to the court in Ms. Green's medical malpractice case places a burden on the filing of her case which is required of none other. She must obtain the approval of an individual who takes no oath to uphold the constitution and laws of the jurisdiction. The determination as to merit is not subject to review. The individual examining as to merit is under no duty to issue the certificate, even if he/she feels there may be a meritorious claim. In fact, no medical provider is under a duty to examine the case of an injured individual. Thus, a medical malpractice plaintiff may be unable to find a physician willing to review the case. Or, the physician may impose a significant fee for reviewing the record, and decline to issue the certificate for reasons unrelated to merit.

Ms. Green requests that this Court grant certiorari and examine the constitutional consequences of a law which requires an individual seeking the adjudication of a claim to obtain the permission of a person with no duty to the court system.

ARGUMENT

I. STATE COURTS HAVE REACHED DIFFERENT RESULTS ON THE CONSTITUTIONALITY OF LAWS LIMITING MEDICAL MALPRACTICE

The Illinois statute which Petitioner challenges imposes stringent requirements on a plaintiff. Simultaneous with the filing of the complaint, a certificate from a health care provider in the same general field with the same type of license certifying the merits of the claim must be filed. The reviewing physician must also write a report which details the basis for his/her conclusion that the cause has merit. The Illinois Supreme Court, in DeLuna v. St. Elizabeth's Hospital, 147 Ill.2d 52, and McAlister v. Schick, 147 Ill.2d 84 (1992), sustained the validity of this statute against challenges based on the Illinois Constitution and Amends. 1, 5 and 14 of the United States Constitution.

The Supreme Court of New Hampshire reached the opposite conclusion in Carson v. Maurer, 120 N.H. 925 (1980). The statute invalidated in New Hampshire, among other measures, established strict standards for "expert" testimony; required a 60-day notice of intent to sue be given before suit was filed; limited non-economic damages to $250,000; authorized courts to order damages in excess of $50,000 in periodic payments; and established a contingent fee scale for attorneys. In striking the statute down on equal protection grounds, the New Hampshire court carefully reviewed the stated

purposes for the legislation, and concluded that they were not sufficiently connected to the procedures established to justify their enactment.

In Quinones v. Charles Harwood Memorial Hospital, 573 F.Supp. 1101 (D.C.Virgin Islands 1983), the District Court for the Virgin Islands upheld a procedure which required a plaintiff to first file a complaint with the Medical Malpractice Review Committee. The Committee was then charged with obtaining expert review of the claim. If the opinion was not delivered in 90 days, the plaintiff was free to file suit. The statute of limitations was tolled for 90 days after the expert opinion was received. The District Court ruled that the procedure did not prevent suit after compliance, and therefore did not violate federal constitutional due process requirements.

In contrast, the District Court in Waggoner v. Gibson, 647 F.Supp. 1102 (N.D.Tex. 1986), while using a "rational relationship" test, found that the statute violated equal protection and due process provisions of the U.S. and Texas Constitutions. That statute limited recovery in a medical malpractice case to $500,000, regardless of the extent of injury or the type of claim filed. In striking the statute down, the Court in Waggoner determined that the "crisis" which was used to justify enactment of the law was questionable (see footnote 2, p. 1106); that limiting the recovery of the severely injured was not a legitimate state interest; and that the goal amounted to a deprivation of due process. The result in Waggoner was later reinforced when the Texas Supreme Court

ruled, in a case certified by the United States Court of Appeals for the Fifth Circuit, that the provision violated the "open courts" provision of the Texas Constitution. See Lucas v. United States, 757 S.W.2d 687 (1988).

Mattos v. Thompson, 491 Pa. 385 (1980), was a case in which the Pennsylvania Health Care Services Malpractice Act was challenged as unconstitutional under the 14th Amendment of the U.S. Constitution, and the jury trial provision of the Pennsylvania Constitution. That act granted original exclusive jurisdiction of medical malpractice claims to arbitration panels. The Supreme Court of Pennsylvania ruled that it did not violate the due process requirements of the U.S. Constitution, but did violate the Pennsylvania Constitution's grant of a right to a jury trial. That court examined the federal issues by requiring a "rational basis" for justification of the statute under the U.S. Constitution.

A Delaware statute which established the Medical Malpractice Review Panel, and authorized the introduction of the panel's finding in a trial, was determined not to violate due process, equal protection, or the right of free access to the courts in Lacy v. Green, 428 A.2d 1171 (Del.Super.1981). Under the court's ruling in Lacy, which employed a "rational basis" analysis, the statute did not preclude suit and the Plaintiff was left with the option to proceed with suit after the panel was convened and had acted on the complaint.

In Paro v. Longwood Hosp., 373 Mass. 645 (1979), the Supreme Court of Massachusetts upheld a statute which set up a screening procedure for medical malpractice cases. The plaintiffs' case was dismissed after they failed to post a $2,000 bond required to continue their appeal after a hearing before the tribunal authorized by statute. The Massachusetts Court found continued availability of medical malpractice insurance at affordable costs to be sufficient rationale for the law. It rejected claimed violations of equal protection and due process based on the U.S. Constitution.

The Supreme Court of Missouri, in State ex rel. Cardinal Glennon Memorial Hospital For Children v. Gaertner, 583 S.W.2d 107 (Mo.1979) found a similar procedure violative of First Amendment principles protecting the right of access to the courts. The Missouri Constitution's "open courts" provision, it determined, protected access to Missouri's courts. The statute which was stricken required the convening of a medical malpractice review board, which was to then make recommendations as to liability and damages. This was determined to be an impermissible interference with the right of access.

Arizona is among other states which have upheld statutes imposing additional requirements for medical malpractice cases [see Eastin v. Broomfield, 116 Ariz. 576 (1977)]. Florida and Ohio are among those which have found statutes violative of state and federal constitutional provisions [Aldana v. Holub, 381 So.2d 231 (Fla.)]. Morris v. Savoy, 60 Ohio St.3d 684 (1991).

The varying interpretations of which provisions, if any, of the U.S. Constitution apply to statutes restricting medical malpractice actions is a compelling reason for this Court to provide guidance to the states on federal constitutional claims. Further, the state courts are in dispute as to the standard to be used in reviewing these statutes--whether they require a rational basis or a compelling state interest as justification for their enactment. This Court's ruling will clarify the issues and the standards to be applied when reviewing laws which impose additional requirements on medical malpractice plaintiffs. Finally, guidance is needed in the application of the appropriate scrutiny to requirements for medical malpractice statutes.

II. THE DECISION OF THE ILLINOIS SUPREME COURT IS IN CONFLICT WITH STANDARDS SET FORTH BY THIS COURT

A. 735 ILCS 5/2-622 Restricts Access To The Courts

735 ILCS 5/2-622 imposes strict requirements on a plaintiff seeking to file a complaint for medical malpractice. Simultaneous with the filing of the complaint and an affidavit by the plaintiff or his/her attorney, a certificate from a health care provider in the same general field with the same type of license certifying the merits of the claim must be filed. The reviewing physician must also write a report which details the basis for his/her conclusion that a "reasonable and meritorious cause for the filing of the

action exists . . . ." Provision is made for a 90-day extension of the time to file the certificate where a statute of limitations is approaching.

Failure to attach the certificate is grounds for dismissal of the case under 5/2-619. The case may be refiled pursuant to 735 ILCS 5/13-217 if it is dismissed for want of prosecution, but must still meet the stringent requirements of 5/2-622. After exhausting all statutory filing options, securing an attorney (who also tried to obtain the certificate) and attempting herself to obtain the certificate, Ms. Green was barred from proceeding through discovery or any other court process designed to assist with the development of the facts necessary to prove a case, despite the fact that her complaint obviously states a claim. For purposes of a review at this juncture, the allegations in Ms. Green's complaint are deemed to be true, Ryland v. Shapiro, 708 F.2d 967 (5th Cir.1983).

B. Access to the Courts Is a Fundamental Right

A right of access to the courts is found in the U.S. Constitution and is well recognized by the U.S. Supreme Court. Ex Parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) recognizes the right in the criminal context and Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) reiterates the right of access in the civil context. The right has been found in the First and Fourteenth Amendments in the civil context. Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907)

also recognized the constitutional right of access through the Privileges and Immunities Clause.

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution. Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907).

In Procunier v. Martinez, 416 U.S. 396, 419, 94 S.Ct. 180, 184, 40 L.Ed.2d 224 (1974), this Court determined that

> Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Lower courts have recognized the right of access as well, e.g. Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir.1983).

> In conclusion, it is clear that, under our Constitution, the right of fundamental access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions.

C. Statutes Restricting A Fundamental Interest Must Satisfy A Compelling State Interest

In reviewing regulation of fundamental rights, such as those guaranteed by the First Amendment rights, this Court has consistently required a stricter showing of governmental interest to demonstrate that such regulation is permissible:

> ". . . . if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." [citations omitted] Wayte v. United States, 470 U.S. 598, 609, 105 S.Ct. 1524, 1532, 84 L.Ed.2d 547 (1985).

That regulation of a fundamental right requires a compelling state interest is well established by the this Court.

D. The State's Interest In Deterring Frivolous Lawsuits Fails To Satisfy A Compelling State Interest

The burden of proving that the government's interests are sufficient to withstand the scrutiny required rests with the government. Elrod v. Burns, 427 U.S. 347 (1976). Given the strict scrutiny required of statutes which impair fundamental rights, The statute at 735 ILCS 5/2-622 cannot survive that scrutiny.

In DeLuna v. St. Elizabeth's Hospital, 147 Ill.2d 57, and McAlister v. Schick, 147 Ill.2d 84, 167 Ill.Dec. 1021, 588 N.E.2d 1151 (1992), the Illinois Supreme Court determined that 5/2-622 should be analyzed under the "rational basis" test and that, under that test, it would pass muster. Petitioner believes stricter scrutiny is required by the U.S. Constitution. Under that standard, the statute must fail.

The statute at issue deprives the average citizen of the right of free access to the courts. It removes the ability to determine the merit of a claim from the judges duly appointed or elected to hear them, and places the authority to determine who can and who cannot present a case to a court in the hands of individuals who have no duty to hold the tenets of the judiciary. It also places injured victims in the unenviable position of seeking an opinion with perhaps the barest of information. Petitioner, who, prior to the doctor's treatment had a medical problem which should have been manageable with the proper administration of medication and/or surgical

intervention, finds herself nearly blind in one eye and completely foreclosed from pursuing her claim beyond the filing of a complaint.

II. 735 ILCS 5/2-622 VIOLATES DUE PROCESS REQUIREMENTS

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

> The fundamental requisite of due process of law is the opportunity to be heard.

Goldberg v. Kelly, 397 U.S. 254, 266, 90 S.Ct. 1011, 1020 (1970), quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed.1363 (1914).

The procedure in place in Illinois does not provide Petitoiner a meaningful opportunity to be heard. There is no way for her to obtain a hearing on her claim by a court without acquiring the certificate and report from a health care professional. The

process allows for extensions in obtaining the certification, but there is no means to bypass it.

The only act a plaintiff can accomplish without the permission of a health care professional is the mere filing of the complaint. The process of closing the courthouse door to Ms. Green may have been delayed by various procedural steps including filing affidavits, extensions, motions, etc., but the end result is the same. She will not be able to proceed beyond the filing of the complaint.

The Constitution must not permit a legislature to invoke a procedure which delegates the decision of who shall have the opportunity to present a case for hearing in a court of law to a myriad of individuals who have no duty to insure that a claim will be reviewed, and that the claimant's case will be judge by clearly delineated standards.

III. 735 ILCS 5/2-622 VIOLATES EQUAL PROTECTION REQUIREMENTS

> Because the creation of different classes of residents raises equal protection concerns, we have also relied upon the Equal Protection Clause in these cases. Whenever a state law infringes a constitutionally protection right, we undertake intensified equal protection scrutiny of that law.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986).

The statute at issue here places a heavy burden on a medical malpractice plaintiff, distinct from that required of any other. Because the statute impinges on a constitutionally protected right, it requires "intensified equal protection scrutiny." It must fail under that scrutiny.

Even if the classification involved is one which compels a showing of a rational relationship to a legitimate state purpose, it must fail. As the U. S. District Court noted in Waggoner v. Gibson, 647 F.Supp.1102 (1986),

> Constitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those who prove at trial that they were most seriously injured by acts of malpractice.

Waggoner analyzed the Texas statute under a rational basis test and determined that its justification was inadequate to withstand scrutiny. The Illinois statute, likewise, cannot sufficiently justify its existence to pass the requirements for constitutionality.

The Supreme Court of Alabama, in a ruling based on provisions of the Alabama Constitution,

found a statute limiting noneconomic damages in medical malpractice cases violative on equal protection grounds.

> The issue, therefore, is whether the connection between the benefit sought to be conferred on society and the means employed to accomplish it, when weighed against the inequalities created by the statute's classification, is so attenuated and remote as to constitute an unreasonable exercise of police power . . . .

Moore v. Mobile Infirmary Assn., 592 So.2d 156, 167 (Ala. 1991).

CONCLUSION

The Illinois statute at issue involves the absolute delegation of the duty to determine who can present a claim to a court. The merits of a case is not for a court to determine, but for a "health care professional," somewhere in this great land, for whatever the cost.

For the foregoing reasons, Petitioner requests that this Court grant certiorari, and address the issue of when a legislature exceeds its authority in attempting to limit medical malpractice actions. This court can also provide guidance and resolve the

conflicts which exist in state court decisions in determining what provisions of the U.S. Constitution are applicable and determinative in cases involving such statutes.

Respectfully submitted,

Doris Green Walker, Esq.
7429 Baltimore Annapolis Blvd.
Glen Burnie, MD 21061
(410) 761-9997

ATTORNEY FOR PETITIONER

APPENDIX

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ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 785-2035

October 2, 1996

No. 81356 - Christene V. Green, petitioner v. Ukeme Umana, M.D., et al., respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1996.

App. 2

No. 5-95-0774
THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT
JULY 20, 1996

SUMMARY ORDER

The plaintiff, Christene V. Green, appeals from the dismissal with prejudice of her complaint which alleged that defendant Ukeme Umana, M.D. (Umana), had prescribed the wrong medicine for her eye condition and performed surgery which worsened the condition, and that defendant Carbondale Eye Clinic (Clinic) failed to properly supervise Umana. The trial court's dismissal of the complaint was based on plaintiff's failure to secure a report by a health professional as required by section 2-622 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-622 (West 1994)). On appeal, plaintiff contends that section 2-622 is unconstitutional and that the trial court should have granted her an extension to obtain a report by a health professional. We affirm.

This complaint is the second time that this cause of action was before both the trial court and this court. On March 10, 1994, plaintiff filed her first complaint, and on April 18, 1994, Umana responded with a motion to dismiss the complaint pursuant to sections 2-619 and 2-622 of the Code (735 ILCS 5/2-619, 2-622 (West 1994)). On May 6, 1994, the trial court struck the complaint and granted plaintiff 30 days in which to file an amended complaint. On June

21, 1994, on motion of plaintiff, the trial court extended for 30 days the time to file an amended complaint. On August 5, 1994, the trial court found that neither an amended complaint nor a supplemental health professional's report had been filed, and the court dismissed the case for want of prosecution subject to being reopened within 30 days upon a showing that such failure was for justifiable reason, with legal authority for such late filing. Instead of trying to comply with the trial court's order, plaintiff attempted to appeal to this court, which dismissed the appeal for the lack of a final appealable order. *Green v. Umana* (October 24, 1994), No. 5-94-0602.

On August 3, 1995, plaintiff filed a new complaint. 1 Attached to the complaint is plaintiff's affidavit, which states in pertinent part, "[Plaintiff has] been unable to secure an attorney to represent me in this matter but am continuing to seek representation [and] I am filing this case pro se due to time limitations." On August 28, 1995, Umana filed a motion to dismiss pursuant to sections 2-619 and 2-622 of Code. On September 11, 1995, plaintiff filed a reply to Umana's motion to dismiss, in which plaintiff alleged that she had "submitted information regarding her claim to a physician in the area of Baltimore, Maryland," and requested a 90-day extension in order to file the required certificate. On September 19, 1995, the trial court found that plaintiff had 18 months since the filing of the original complain to secure the report of health professional and that the failure to file

a certificate of a health professional is a ground for dismissal under section 2-619 of the Code, and the trial court dismissed the complaint with prejudice.

Plaintiff appeals to this court and contends that section 2-622 of the Code violates the Illinois and United States Constitutions by restricting access to the courts. Arguments similar to those raised in plaintiff's brief were considered by our supreme court in *DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 588 N.E.2d 1139 (1992). Our supreme court found that section 2-622 was not unconstitutional. Where the supreme court has declared the law on any point, it alone can overrule or modify its previous opinion, the lower judicial tribunals being bound to follow such decision in similar cases. *Super Liquors, Inc. v. Illinois Liquor Control Comm'n*, 113 Ill.App.3rd 229, 232, 446 N.E.2d 945, 948 (1983). Further, we cannot find that the trial court erred in failing to grant plaintiff additional time to obtain the report of a health professional. See *Wasielewski v. Gilligan*, 189 Ill.App.3d 945, 951-52, 546 N.E.2d 15, 19 (1989).

Affirmed pursuant to Supreme Court Rule 23(c)(2) (Official Reports Advance Sheet No. 15 (July 20, 1994), R.23(c)(2), eff. July 1, 1994).

WELCH, J., with GOLDENHERSH and RARICK, JJ., concurring.

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, JACKSON COUNTY

CHRISTENE V. GREEN,
Plaintiff,
VS. No. 95-L-162
UKEME UMANA, M.D. and
THE CARBONDALE EYE CLINIC,
Defendants.

ORDER

THIS MATTER comes before the Court on the Motion to Dismiss Pursuant to Section 2-619 and 2-622 of the Illinois Code of Civil Procedure filed September 11, 1995. Oral argument is not necessary. This matter was previously before the Court in the Jackson County, Illinois case styled No. 94-L-36 *Christene V. Green v. Uneme Umana.* The 1994 case was dismissed by Order entered on August 5, 1994 for want of prosecution. The case *sub judice* was filed within one (1) year of the date of dismissal. Two (2) arguments are made by the plaintiff in Plaintiff's Motion for Extension of Time. The first argument is that 735 ILCS 5/2-622 is unconstitutional. The second argument is that the plaintiff needs additional time to secure the report of a health professional. Both of these arguments were raised in the 1994 case. In the 1994 case, this Court found that *DeLuna v. St. Elizabeth's Hospital,* 147 Ill.2d 57, addressed the

arguments concerning the constitutional questions raised by the plaintiff. The claim of unconstitutionality was denied in the Order entered May 6, 1994. Said Order also found that the Affidavit attached to the Complaint in the 1994 was "wholly insufficient for the purposes of complying with 735 ILCS 5/2-622." Said Order struck the Complaint and granted the plaintiff thirty (30) days to file an amended complaint. On June 8, 1994, the plaintiff requested an extension of time to file a supplemental report of a health professional. The request was granted by the Court on June 21, 1994. No report was ever filed and an amended complaint was not filed. An Order was entered on August 5, 1994 dismissing the case for want of prosecution ninety (90) days after the Order was entered striking the original Complaint; sixty (60) days after the period of time granted to the plaintiff to file an amended complaint; and, two (2) weeks after the extended period transpired.

The Court FINDS that:

a. The plaintiff has had eighteen (18) months since the original Complaint was filed in the 1994 case to comply with 735 ILCS 5/2-622 by securing the report of a health professional.

b. The plaintiff should have been advised of the necessity of filing such a report at the time the original Complaint was filed.

However, the record is clear that the plaintiff was so advised in the Order entered May 6, 1994. In the year and four months since that date, the plaintiff has still not secured the report of a health professional.

c. The requirement of a report by a health professional is constitutional pursuant to *DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57.

d. 735 ILCS 5/2-622 states

> The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.

THEREFORE, it is the ORDER of this Court that the Complaint filed August 3, 1995 is INVOLUNTARILY DISMISSED with prejudice pursuant to 735 ILCS 5/2-622. There is no reason to delay an appeal of this Order.

Entered this 19th day of September, 1995.

s/ WILLIAM G. SCHWARTZ
Circuit Judge

CHRISTENE V. GREEN
Pro se
207 E. Willow Street
Carbondale, IL 62901

WM. KENT BRANDON
Brandon & Schmidt
P. O. Box 3898
Carbondale, IL 62902-3898

IN THE CIRCUIT COURT FOR THE
FIRST JUDICIAL CIRCUIT
JACKSON COUNTY, ILLINOIS

CHRISTENE V. GREEN
207 E. Willow Street
Carbondale, Illinois 62901

-vs- JURY TRIAL

UKEME UMANA, M.D.
1001 Beadle Drive
Carbondale, Illinois 62901
and
THE CARBONDALE EYE CLINIC
1001 Beadle Drive
Carbondale, Illinois 62901

COMPLAINT

CHRISTENE V. GREEN, Plaintiff Pro Se, herein represents unto this Honorable Court:

1. In 1988, Plaintiff responded to an offer for a free eye examination through the National Eye Care Project.

2. At the eye examination, Plaintiff was informed that she had glaucoma and she was referred to the Carbondale Eye Clinic for further examination.

3. At the Carbondale Eye Clinic, Plaintiff was assigned to a physician.

4. Plaintiff commenced a course of treatment under the care of Uneme Umana, M.D., on or about November 19, 1988.

5. At the time Plaintiff began seeing Defendant Umana, her vision in each eye was 20/25 and the pressure by which the glaucoma is measured was 22 and 20.

6. Plaintiff, pursuant to the care and recommendations of the Defendants, began a course of medication including Timoptic, Atropine, Chinrexan, Pilocar, Diamox, Prednisone, and Econopred in varying doses.

7. Some of the medications, as prescribed, caused side effects as delineated below which the Plaintiff could not tolerate.

a. Diamox caused the Plaintiff to have muscle spasms, tingling in her toes and fingers, and to feel "shaky";

b. Econopred made Plaintiff's hands feel like they had cobwebs on them.

8. In January and February, 1992, Plaintiff also experienced double vision, which she had not experienced before.

9. Defendant Umana determined that Plaintiff's medications were insufficient treatment for the glaucoma and performed a laser procedure on the Plaintiff in February, 1992.

10. After this initial procedure, Plaintiff's vision became blurry and Plaintiff was unable to see as well as before the procedure.

11. Defendant Umana determined that a trabeculectomy O.D. should be performed on the Plaintiff.

12. The trabeculectomy was performed on March 20, 1992.

13. Plaintiff's vision improved immediately after the procedure, the pressure related to the glaucoma decreased, and Plaintiff and the Defendant were satisfied with the results of the procedure.

14. After the trabeculectomy in March, 1992, Plaintiff was given a medication known as PILOCAR, aka PILO which she used per instructions.

15. Plaintiff's eye became inflamed and her vision began to blur after use of the medication.

16. Plaintiff discontinued using the PILOCAR prior to her next visit to the Defendant Umana due to the effects of the drug such as inflammation and blurring.

17. When Plaintiff returned to Defendant Umana, he advised Plaintiff that she had been given the wrong medication and that the medication which she had used, i.e. PILO, could do damage to her eye.

18. After the surgery in 1992, Plaintiff's eyelid also began to droop, taking on the appearance of an eye half-closed at all times.

19. Plaintiff's vision remained blurry and further deteriorated until the Defendant advised that further surgery would be necessary to try to improve the vision.

20. In February, 1993, Defendant Umana performed another outpatient surgery on the Plaintiff's eye.

21. Subsequent to the surgery, Defendant Umana advised the Plaintiff and her daughter that the condition of the Plaintiff's eye was unlike any he had seen before, that there was a significant amount of scar tissue in the Plaintiff's eye which had made the surgery difficult and unpredictable.

22. Defendant advised that during said operation, in attempting to separate the eye from the scar tissue in order to insert a lens, Defendant inadvertently tore the membrane, and had to modify his surgical plans to place the lens in the back of the eye instead of the front.

23. After the surgery in 1993, Plaintiff's vision in the eye was worse than before the surgery.

24. Plaintiff could not discern the piano in her living room--only that there was a large blurry object there.

25. Plaintiff's vision, since the surgery in February, 1993, improved somewhat after approximately nine months: but it is still not as clear as even the impaired vision which Plaintiff had after being given the wrong medication.

26. The Plaintiff has experienced great pain and suffering as a result of the numerous medications, repeated surgeries and incorrect medication administered by the Defendant.

27. After all the medication and surgeries, Defendant's eye pressure, the standard by which the progression of her glaucoma is measured has been higher than it was prior to Plaintiff's beginning her course of treatment under the Defendant.

28. Defendants have been negligent and breached their standard of care in the following particulars:

A. By failing to adequately supervise the Plaintiff's care:

B. By filing to prescribe the proper medication for the Plaintiff:

C. By failing to adequately supervise the dispensation of medication to the Plaintiff:

D. By failing to adequately evaluate the Plaintiff's condition prior to subsequent surgeries:

E. By failing to adequately prepare for complications which Defendants knew or should have known might arise from surgery to an eye which displayed the symptoms displayed by the Plaintiff's eye:

F. By failing to correct the Plaintiff's "droopy" eyelid in February, 1993 when Defendant Umana was aware of the condition of said eyelid, and that its correction would require yet another surgery if it was not corrected at that time.

29. The Defendant's negligent acts and omissions are the proximate cause of the injury to Plaintiff's eye and the resulting pain and deteriorated vision from which she now suffers.

30. That the Plaintiff has been damaged in the following particulars:

A. Pain and suffering;

B. Plaintiff has been forced to travel out of the state to seek treatment from other medical doctors in an attempt to salvage and/or restore her vision;

C. Plaintiff has lost wages due to the various operations, consultations and travel occasioned by the Defendant's negligent acts.

31. Plaintiff has exercised due diligence in all efforts to have her eyes treated and preserve her vision as best as possible.

32. That ILCS 735 5/2-622 is violative of the U.S. Constitution including Amends. I, V, VII and XIV on its face and as applied.

33. That ILCS 735 5/2-622 is violative of the Illinois Constitution on its face and as applied.

WHEREFORE, Plaintiff prays for the following relief:

A. Compensatory damages in the amount of Three Million Dollars ($3,000,000.00);

B. Damages for lost wages, travel and pain and suffering;

C. That ILCS 735 5/2-622 be declared violative of the Constitutions of the United States and of Illinois on its face;

D. That ILCS 735 5/2-622 be declared violative of the Constitutions of the United States and of Illinois as applied;

E. For such other and further relief as may be deemed just and proper.

s/Christene V. Green
CHRISTENE V. GREEN
Plaintiff Pro Se
207 E. Willow Street
Carbondale, Illinois 62901
(618) 549-2223

PLAINTIFF'S AFFIDAVIT

Christene V. Green, being first duly sworn, herein deposes and says:

1. I am the Plaintiff in the case of Green v. Umana, et al.

2. I was informed by Dr. Umana himself that I was given the wrong medication to put in my eye after a laser procedure in 1992.

3. Dr. Umana also told my daughter, Doris Walker of Linthicum, Maryland (in my presence) that I had been given the wrong medication for my eye and that the medication had caused the inflammation and blurred vision in my eye subsequent to the laser procedure.

4. Dr. Umana also informed my daughter about the difficulty with my surgery in 1993 including the torn membrane and the adjustments which had made during the surgery.

5. I have been unable to secure an attorney to represent me in this matter but am continuing to seek representation.

6. I am filing this case pro se due to time limitations.

I HEREBY CERTIFY under the penalties of perjury that the foregoing information is true and correct to the best of my knowledge, information and belief.

s/Christene V. Green
CHRISTENE V. GREEN

COUNTY OF JACKSON, SS, STATE OF ILLINOIS

Sworn to before me this 2nd day of August, 1995.

s/Sharon L. Zoromski
Notary Public

My Commission Expires: 4-19-99

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT
JACKSON COUNTY, ILLINOIS

CHRISTENE V. GREEN Plaintiff	)	
-vs-	)	No. 95-L-162
UKEME UMANA, M.D. and THE CARBONDALE EYE CLINIC Defendants	)	

MOTION TO DISMISS PURSUANT TO
SECTION 2-619 AND 2-622 OF THE
ILLINOIS CODE OF CIVIL PROCEDURE

NOW COMES the Defendant, Dr. Ukeme Umana, by his attorneys, Brandon & Schmidt, and for his Motion to Dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619 and 2-622 of the Illinois Code of Civil Procedure, states:

1. Plaintiff originally filed her Complaint against Defendant, Case No. 94-L-36, a copy of which is attached as Exhibit A. Defendant, in that cause, filed a Motion to Dismiss Pursuant to Section 2-619 and 2-622 and a Memorandum in Support thereof, copies of which are attached hereto and marked Exhibits B and C.

2. The Court struck the original Complaint and granted leave to file an Amended Complaint setting out its findings in an Order dated May 6, 1994, a copy of which is attached and marked Exhibit D.

3. The Court granted to the Plaintiff two extensions to comply with its Order, but upon Plaintiff's failure to do so dismissed the Complaint for want of prosecution in an Order dated August 5, 1994, a copy of which is attached hereto and marked Exhibit E.

4. The Plaintiff filed a Notice of Appeal to which the Defendant responded with a Motion to Dismiss which was granted by the Appellate Court on October 24, 1994, a copy of the Appellate Court Order is attached hereto and marked Exhibit F.

5. Thereafter, on January 4, Defendant filed a Motion to Dismiss for Want of Prosecution, a copy of which is attached hereto and marked Exhibit G, which was granted by the Court in an Order dated January 9, 1995, a copy of which is attached hereto and marked Exhibit H.

6. The Complaint in this case was filed on August 3, 1995 and is essentially the same Complaint as the original Complaint. It differs in that the Plaintiff has attempted to address the insufficiencies set out in subparagraph (a) of the Order of Court dated May 6, 1994.

7. In that regard, the Plaintiff as addressed the insufficiencies as follows:

i. Not addressed same allegation.
ii. Addressed.
iii. Addressed.
iv. Has inserted the phrase February 1992 but has alleged no specific date. Such procedure would be outside the two year State of Limitations based on filing of the original Complaint.
v. Addressed.
vi. Probably addressed if "the procedure" refers to the trabulectomy.
vii. Addressed.
viii. Addressed.
ix. Not addressed in that no specific date is given for the surgery in February 1993.

8. The Plaintiff has totally failed to address the finding of the Court in subparagraph (b) of said Order in that the Affidavit which is attached to this Complaint is identical to the Affidavit attached to the original Complaint which the Court found to be wholly insufficient.

9. Plaintiff's Reply to Defendant's Motion to Dismiss which was filed on April 28, 1994, a copy of which is attached and marked Exhibit I, alleged that 735 ILCS 5/2-622 violated the U.S. Constitution Amendments I, V and XIV and also the Illinois Constitution claiming that it was an unconstitutional restriction of access to the Courts.

10. The Court addressed this issue in subparagraph (c) of its Order of May 6, 1994 citing the case of *DeLuna v. St. Elizabeth's Hospital*, 588 N.E.2d 1139, 147 Ill.2d 57, 167 Ill.Dec. 1009 which specifically held Section 2-622 to be constitutional under the provisions of both the Illinois and the U.S. Constitution.

11. Paragraphs 32 and 33 of this Complaint realleges that 2-622 violates the U.S. Constitution including Amendments I, V, VII and XIV and violates the Illinois Constitution with no specific provisions being cited. *DeLuna* is still good law in Illinois, and these alleged constitutional challenges based on the U.S. Constitution and Illinois Constitution should be dismissed with prejudice.

12. Except for the cosmetic changes cited herein, Plaintiff's Complaint in this case is identical to the Complaint which the Court previously dismissed in the original lawsuit, and for the reasons set out in the Court's Order of May 6, 1994 and in the Motions and Memoranda filed by the Defendant regarding the original lawsuit, which are hereby realleged and refiled in this lawsuit, this lawsuit should also be dismissed.

WHEREFORE, Defendant, Dr. Ukeme Umana, prays as follows:

1. That Paragraphs 32 and 33 of Plaintiff's Complaint and Paragraphs C and D of Plaintiff's prayer for relief be dismissed with prejudice pursuant to Section 2-619.

2. That Plaintiff's Complaint be dismissed with prejudice pursuant to Section 2-622 for failure to file the required Health Professional's Report or to allege the inability to do so pursuant to Section 2-622(a)(2).

3. That, in the alternative, that Plaintiff be granted 90 days from the date of filing of this Complaint which was on August 3, 1995 to file the Health Professional's Report required by Section 2-622 and that upon failing to do so that Plaintiff's Complaint be dismissed with prejudice at that time.

BRANDON & SCHMIDT
BY s/Wm. Kent Brandon
Wm. Kent Brandon,
Attorney for Defendant
IL.REG.NO. 00278742

PROOF OF SERVICE

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT
JACKSON COUNTY, ILLINOIS

CHRISTENE V. GREEN Plaintiff	)	
-vs-	)	No. 95-L-162
UKEME UMANA, M.D., et al. Defendants	)	

PLAINTIFF'S REPLY TO
DEFENDANT'S MOTION TO DISMISS

Now comes the Plaintiff, Christene V. Green, acting pro se, and herein replies to the Defendant's Motion To Dismiss Pursuant To Sections 2-619 and 2-622 of the Illinois Code of Civil Procedure. In response to Defendant's Motion, Plaintiff would show:

1. That Plaintiff has submitted information regarding her claim to a physician in the area of Baltimore, Maryland.

2. That Plaintiff is seeking additional time to determine if the certificate required by ILCS 5/2-622 is obtainable.

3. That ILCS 735 5/2-622 is violative of Amends. I, V, and XIV, U.S.CONST. in that it violates due process by imposing an impermissible restriction on the Plaintiff's access to the courts.

4. That ILCS 735 5/2-622 violates Amends. I, V and XIV, U.S.CONST. because it denies equal protection to complainants in cases involving medical claims.

5. That ILCS 735 5/2-622 violates Amends. I, V, and XIV, U.S.CONST. by abridging Plaintiff's privileges and immunities as a citizen of these United States.

6. That ILCS 735 5/2-622 violates Art. I, Sect. 2 of the Illinois Constitution.

7. Attached hereto is the Plaintiff's Motion For Extension Of Time.

WHEREFORE, Plaintiff prays for the following relief:

A. That Defendant's motion to dismiss Plaintiff's complaint be denied;

B. For such other and further relief as may be deemed just and proper.

Respectfully submitted,

s/Christene V. Green
Christene V. Green
Plaintiff Pro Se
207 E. Willow Street
Carbondale, Illinois 62901

Supreme Court, U.S.
FILED
MAY 16 1997
CLERK

No. 96-1644

In The

Supreme Court of the United States

October Term, 1996

CHRISTINE V. GREEN,

Petitioner,

vs.

UKEME UMANA, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.

LIST OF INTERESTED PARTIES

Petitioner (Plaintiff Below):

Christine V. Green
207 E. Willow Street
Carbondale, Illinois 62901

Respondent (Defendant Below):

Ukeme Umana, M.D.
1001 Beadle Drive
Carbondale, Illinois 62901

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Respondent, Ukeme Umana, M.D. and The Carbondale Eye Clinic (Clinic) submits this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari filed herein by Christine V. Green. Respondent respectfully submits that this Court should deny the Petition to review the Opinion of the Illinois Appellate Court for the Fifth District (published in the Official Advance Reports, Advance Sheet No. 15, July 20, 1994) and subsequent denial of Petition for Leave to Appeal submitted to the Supreme Court of Illinois in this case.

SUMMARY OF ARGUMENT

Petitioner claims that the Illinois Code of Civil Procedure, Section 5/2-622 is unconstitutional in that it:

(a) restricts her right of free access to the court, as guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution;

(b) impinges on her right to petition the nation's courts as guaranteed by the First Amendment of the United States Constitution;

(c) violates her due process rights by denying her a meaningful opportunity to have her allegations heard; and

(d) violates her right to equal protection by imposing a burdensome requirement in the form of a certificate of merit at the time that her Complaint was filed against the Respondent.

The Supreme Court of Illinois has specifically addressed and rejects these very propositions in *Deluna v. St. Elizabeth's Hospital,* 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992). This is the sole reason that Petitioner's Petition for Leave to Appeal to the Supreme Court of Illinois was denied. The Supreme Court of

Illinois addressed each constitutional attack of Petitioner, and held Section 5/2-622 to be constitutional. *See Deluna v. St. Elizabeth's Hospital; McAlister v. Schick,* 147 Ill. 2d 84, 588 N.E. 2d 1151 (1992).

STATEMENT OF THE CASE

The Petitioner, Christine V. Green, filed her first Complaint claiming actions of medical negligence against the Respondent, Ukeme Umana, M.D. and the Carbondale Eye Clinic (Clinic) on March 10, 1994. Petitioner failed to attach the requisite Affidavit pursuant to Section 5/2-622 of the Illinois Code of Civil Procedure, which provides that the Petitioner must attach to her Complaint an Affidavit stating that a knowledgeable physician has determined that there is a reasonable and meritorious cause of action. Petitioner did file an Affidavit, but it merely alleged that Petitioner "had been unable to secure an attorney to represent me . . ." On April 18, 1994, Respondent filed a Motion to Dismiss with supporting Memorandum of Law pursuant to Sections 5/2-622 and 5/2-619 of the Illinois Code of Civil Procedure, alleging that failure of Petitioner to file and attach an adequate Affidavit under Section 5/2-622. On April 28, 1994, Petitioner filed a Motion for a 90 Day Extension and a Reply to Respondent's Motion to Dismiss.

On May 6, 1994, the trial court found Petitioner's Complaint to be insufficient in that her Affidavit was "wholly insufficient to comply with 735 ILCS 5/2-622" and found that Petitioner's allegations concerning the unconstitutionality of same had previously been resolved and decided in *Deluna v. St. Elizabeth's Hospital.* In the trial court's holding, it struck Petitioner's Complaint and granted her 30 days to file an Amended Complaint.

Petitioner did not file an Amended Complaint within the

thirty (30) days. On June 8, 1994, Petitioner filed a Motion for Extension of Time to File Supplemental Health Professional's Report. On June 21, 1994, the trial court granted Petitioner 30 days to file said report. The report was never filed.

On August 5, 1994, the trial court entered its Order finding that the Petitioner "has filed neither an Amended Complaint nor a Supplemental Health Professional's Report" and dismissed the case for want of prosecution subject to being reopened within 30 days upon a showing that the Petitioner's failure was for justifiable reason, and required that the Petitioner provide the court with legal authority to aid in explanation for such late filing.

Petitioner filed her Notice of Appeal on September 2, 1994, completely disregarding the trial court's Order. Respondent filed a Motion to Dismiss with attached Memorandum of Law as the trial court's Order was not a final appealable Order, and same was granted by the Fifth District Appellate Court of Illinois on October 24, 1994. The mandate was issued on November 23, 1994. The trial court dismissed the Petitioner's Complaint for want of prosecution on January 9, 1995 after a formal Motion to Dismiss was filed by the Respondent.

Petitioner filed her Complaint once again, on August 3, 1995, with identical allegations of medical negligence on the part of Dr. Ukeme Umana, M.D. The only substantial change amounted to adding the Carbondale Eye Clinic (Clinic) as an additional Defendant, although no allegations were directed to the Clinic and no relief was requested from same. The Petitioner did not attach an Affidavit pursuant to the Illinois Code of Civil Procedure, Section 5/2-622. On August 28, 1995, once again, the Respondent filed a Motion to Dismiss and attached Memorandum of Law Pursuant to Section 5/2-619 and 5/2-622, setting forth the background of the previous lawsuit along with

relevant case law in support thereof. Said Motion prayed that the trial court dismiss the Petitioner's Complaint with prejudice pursuant to the Illinois Code of Civil Procedure for her refusal to file the required health professional's report or to allege specific reasons for same, pursuant to Section 5/2-622(a)(2). In the alternative, the Respondent prayed that Petitioner be required to file said report within ninety (90) days.

On September 11, 1995, Petitioner filed a response with the trial court alleging that she had "submitted information regarding her claim to a physician in the area of Baltimore, Maryland and needed additional time to determine if the Certificate required is obtainable", and reiterated her belief that Section 5/2-622 of the Illinois Code of Civil Procedure was unconstitutional. Petitioner also filed a Motion for Extension of Time for an additional ninety (90) days. On September 19, 1995 the trial court dismissed the Petitioner's Complaint involuntarily, with prejudice, pursuant to Section 5/2-622.

The Illinois Appellate Court for the Fifth District affirmed the trial court's decision and held that the Supreme Court of Illinois' decision in *DeLuna v. St. Elizabeth's Hospital,* 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992) governed all constitutional issues raised by the Petitioner herein. The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal on these issues.

REASONS FOR DENYING THE WRIT

I.

SECTION 5/2-622 OF THE ILLINOIS CODE OF CIVIL PROCEDURE, WHICH REQUIRES THE FILING OF A HEALTH PROFESSIONAL'S WRITTEN REPORT IN A MEDICAL MALPRACTICE CASE IS CONSTITUTIONAL.

Petitioner claims that the Illinois Code of Civil Procedure, Section 5/2-622 is invasive of the United States Constitution, specifically the First, Fifth and Fourteenth Amendments contained therein, in that it:

a. Impermissibly restricts her right of free access to the courts;

b. Impermissibly impinges in her right to petition the nation's courts;

c. Denies her a meaningful opportunity to be heard, in violation of her Due Process rights; and

d. Denies her right to equal protection by imposing a burdensome requirement on medical malpractice plaintiffs.

Each of these contentions were specifically addressed by the Supreme Court of Illinois in *Deluna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 588 N.E. 2d 1139 (1992), reexamined by same in *McAlister v. Schick*, 147 Ill. 2d 84, 588 N.E. 2d 1151 (1992) and *Miller v. Gupta*, 174 Ill. 2d 120, 672 N.E. 2d 1229 (1996) and reaffirmed as recently as February 4, 1997, wherein the Appellate Court for the First Judicial Circuit of Illinois specifically addressed the constitutionality of Section 5/2-622 in *Calamari v. Drammis*, 1997 WL 43134 (4th Dist. 1997).

As in each of the aforementioned cases, Petitioner's contentions involve the alleged unconstitutionality of Section 5/2-622 of the Illinois Code of Civil Procedure. Said statutory provision is applicable to "any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice." 735 ILCS 5/2-622(a) (West 1992). To conform with Section 5/2-622, the plaintiff must attach to the complaint an affidavit certifying that she has consulted and reviewed the facts of the case with a health professional, who has determined in a written report that there is "a reasonable and meritorious cause" for filing the action. 735 ILCS 5/2-622(a)(1) (West 1992). Failure to file same, "shall be grounds for dismissal under Section 5/2-619." 735 ILCS 5/2-622(g) (West 1992).

At the onset, it must be recognized that there is a strong presumption that legislative enactments are deemed constitutional. *See Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E. 2d 763 (1986). Further, courts have a duty to sustain legislation whenever possible and to resolve all doubts in favor of constitutional validity. *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E. 2d 713 (1952).

A. Section 2-622 Does Not Deny Litigants Access to the Court System.

Along with the United States Constitution, Article I, section 12 of the Illinois Constitution also entitles individuals to seek remedy in the laws for all "injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. 1970, art. I, sec. 12. The Supreme Court of Illinois has interpreted this provision as "an expression of a philosophy and not a mandate that a certain remedy be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." *Sullivan v.*

Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E. 2d 659 (1972). This view continues to prevail in Illinois. As long as consistency is maintained regarding separation of powers, the legislature may impose reasonable conditions and limitations on the judicial branch to define and clarify access to the court system. *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 483 N.E. 2d 1271 (1985).

Section 2-622 simply requires a plaintiff to obtain, prior to trial, a certificate from a health care professional, stating that the claim has a factual and meritorious claim. As the Supreme Court of Illinois held in *Deluna*, said requirement is merely a parallel requirement for the forthcoming trial, wherein plaintiff must present expert testimony to demonstrate the applicable standard of care and the defendant's breach. *Deluna*, 147 Ill. 2d at 63.

As per the rational basis standard, Section 2-622 is primarily intended to eliminate frivolous suits, and it imposes no greater duty on healing art malpractice litigants than that required at the time of trial on the merits. *Id. at 64.*

B. Section 2-622 Does Not Violate the Equal Protection Clause Nor the Due Process Clause of the United States Constitution.

Section 2-622 does not "implicate a suspect or quasi-suspect classification". Therefore, the appropriate standard for determining if the Petitioner herein has an equal protection challenge is by utilizing the Rational Basis Test. (*See* Respondent' Argument, Section II). *See also McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969).

In addition, Section 2-622 does not burden a fundamental

right, and for the purposes of the Petitioner's Petition for Writ of Certiorari, the appropriate inquiry under the due process challenge is also whether the legislation bears a rational relationship to a legitimate governmental interest. *Williams v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955); *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 368, 489 N.E. 2d 1374 (1986).

While testing both of the Petitioner's challenges against the appropriate standard, the Supreme Court of Illinois had no difficulty in determining that Section 2-622 serves a necessary, legitimate governmental interest. As the court noted, "the statute is intended to reduce the number of frivolous actions that may otherwise be filed. By requiring litigants to obtain, at an early point, the opinion of an expert who agrees that a meritorious cause of action exists, the statute will help ensure that only claims with some merit are presented." *Deluna* at 75.

II.

SECTION 5/2-622 OF THE ILLINOIS CODE OF CIVIL PROCEDURE IS CONSTITUTIONAL AS IT IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

As the Supreme Court of Illinois clarified in *Bernier*, the rational basis standard must be utilized to test the constitutionality of medical malpractice legislation under guarantees of due process and equal protection. The standard is whether the provisions bear a rational relationship to a legitimate governmental interest. *Bernier*, 113 Ill. 2d at 228. Illinois courts have consistently found Section 5/2-622 to be rationally related to a legitimate, important purpose of the legislature, that is elimination of frivolous lawsuits at their initiation phase. *Lyon v. Hasbro Industries, Inc.*, 156 Ill. App.

3d 649, 509 N.E. 2d 702 (4th Dist. 1987). This specific section of the Illinois Code of Civil Procedure was contained as a portion of the medical malpractice reform legislation enacted by the General Assembly in 1985 in response to a perceived crisis in the field of medical malpractice. *Bernier,* 113 Ill. 2d at 252.

Petitioner herein has the burden to establish the statute's invalidity, otherwise it is presumed to be valid. *Pre-School Owners Association of Illinois, Inc. v. Department of Children & Family Services,* 119 Ill. 2d 268, 518 N.E. 2d 1018 (1988). The Petitioner has provided this Honorable Court with no relevant, pertinent, prior decisions to enable this Court to have a necessity to review the constitutionality of this specific section of the Illinois Code of Civil Procedure, 5/2-622. Thus, this Court should deny Petitioner's request for Writ of Certiorari to issue.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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